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March 15, 2015

By ECF

The Honorable Denise L. Cote,  
United States District Judge,  
Daniel Patrick Moynihan United States Courthouse,  
500 Pearl Street, Room 1610,  
New York, New York 10007-1312.

Re: FHFA v. Nomura Holding America, Inc., et al., 11 Civ. 6201 (S.D.N.Y.)

Dear Judge Cote:

On behalf of defendants, I write regarding objections to certain portions of the proffered testimony of plaintiff's expert John A. Kilpatrick, who is scheduled to testify tomorrow.

Defendants move to strike as inadmissible hearsay those sections of Dr. Kilpatrick's testimony that seek to incorporate by reference his own unsworn expert reports. *See, e.g.*, ¶¶ 26 n. 9, 31 n.10, 33 n.11, 34 n.12, 38 n.13, 38 n.15, 41 n.16, 43 n.17, 44 n.18, 45 n.20, 46 n.21, 47 n.22, 49 n.25, 55 n.27, 57 n.28, 59 n.29, 59 n.30, 63 n.33, 68 n.35, 73 n.36, 74 n.37, 77 n.38, 78 n.39, 93 n.42, 96 n.43, 101 n.45, 103 n.46, 104 n.47, 106 n.48, 108 n.49, 109 n.50, 116 n.52, 117 n.53-54, 119 n.56, 130 n.61, 136 n.63-67, 154 n.72, 191 n.75, 210 n.79, 231 n.82, 235 n.84, 238 n.86, 244 n.90, 248 n.98, 249 n.100, 250 n.101-02, 252 n.104, 254 n.105, 255 n.107-08, 256 n.109, 257 n.111, 266 n.113-14, 267 n.115-16, 268 n.117-20, 269 n.121-22, 270 n.123, 272 n.124-25, 276 n.126, 277 n.127, 282 n.128, 284 n.129, 287 n.130 (variously incorporating the May 15, 2014 Report of John Kilpatrick Concerning Adherence; July 9, 2014 Supplement to the Report of John Kilpatrick Concerning Extrapolation; May 15, 2014 Report of John Kilpatrick Concerning Accuracy; Nov. 10, 2014 Rebuttal Report of John Kilpatrick; Oct. 6, 2014 Report of John Kilpatrick; June 27, 2014 Report of John Kilpatrick).

This Court has previously held that "expert reports constitute inadmissible hearsay." *FHFA v. Nomura Holding America Inc.*, 2015 WL 539489, at \*9 (S.D.N.Y. Feb. 10, 2015). Courts accordingly do not admit as evidence the expert reports of testifying experts. *Granite Partners, L.P. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2002 WL 826956, at \*7 (S.D.N.Y. May 1, 2002) ("The written reports of any expert expected to testify for either the Funds or Merrill is hereby excluded as inadmissible hearsay."); *Ake v. General Motors Corp.*, 942 F. Supp. 869, 877-78 (W.D.N.Y. 1996) ("The author of the report . . . is plaintiff's expert

Hon. Denise L. Cote

-2-

witness who is scheduled to testify at trial. Nevertheless, the report is hearsay. . . . [T]he report is not admissible as a basis for [his] expert opinion. The report *is* his opinion. [He] may testify about some things in the report, but the report itself is inadmissible.”) (emphasis in original). Consequently, the portions of Dr. Kilpatrick’s testimony that are noted above (and that seek to incorporate by reference his own expert reports) should be stricken.

Respectfully submitted,

/s/ David B. Tulchin

David B. Tulchin

cc: Counsel of record via ECF.